SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 449.

THE UNITED STATES, APPELLANT,

vs.

CECIL D. ROSS.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

1 I. *Petition. Filed April 15, 1904.*

In the Court of Claims.

CECIL D. ROSS, CLAIMANT,
vs.
THE UNITED STATES, DEFENDANT. } No. 24889.

Petition.

To the honorable, the Court of Claims of the United States:

The petition of Cecil D. Ross respectfully represents:

1. That petitioner is a citizen of the United States and a resident of the county of Lincoln, State of Mississippi.

2. That on or about the 25th day of April, 1900, petitioner enlisted in the Army of the United States as a private in the Infantry service, and on or about the first day of September, 1900, was transferred, as a private, to the Hospital Corps of said Army.

3. That on the 9th day of November, 1900, petitioner was ordered by his commanding officer to the performance of duty as a telegraph and telephone operator in the General Hospital at the Presidio, near the city of San Francisco, State of California, and remained on duty as a telegraph and telephone operator at said hospital from and including said 9th day of November, 1900, until the 24th day of April, 1903.

2 4. That the duty so performed as above set forth was extra duty, and was performed at department headquarters.

5. That section 1287 of the Revised Statutes of the United States provides:

"When soldiers are detailed for employment as artificers or laborers in the construction of permanent military works, public roads, or other constant labor of not less than ten days' duration, they shall receive, in addition to their regular pay, the following compensation: Privates working as artificers and noncommissioned officers employed as overseers of such work, not exceeding one overseer for twenty men, thirty-five cents per day; and privates employed as laborers, twenty cents per day. This allowance of extra pay shall not apply to the troops of the Ordnance Department."

6. That rate of compensation to be paid to enlisted men of the United States Army for extra duty was subsequently changed by a provision of the act of Congress, approved July 5, 1884 (23 Stats., 107–110), which said provision reads as follows, to wit:

"*Provided*, That two hundred and fifty thousand dollars of this sum, or so much of it as shall be necessary, shall be set aside for the payment of enlisted men on extra duty at constant labor of not less than ten days, and such extra-duty pay hereafter shall be at the rate of 50 cents per day for mechanics, artisans, school-teachers, and clerks at Army, division, and department headquarters, and 35 cents per day for other clerks, teamsters, laborers, and others."

7. That petitioner has never received or been paid any money whatsoever in compensation for or on account of his services or
3 labor as a telegraph and telephone operator as aforesaid, notwithstanding said above-mentioned provisions of law.

8. That petitioner made claim before the Auditor for the War Department for compensation for extra duty performed as aforesaid, which claim was disallowed by that officer; that thereupon petitioner appealed from the action of said auditor to the Comptroller of the Treasury, and that said claim was rejected by said comptroller, by decision rendered on November 25, 1903.

9. That petitioner is justly entitled to receive and recover from the United States the sum of four hundred and fifty-three dollars and fifty cents ($453.50), being 50 cents per day for said extra duty from and including the 9th day of November, 1900, until the 24th day of April, 1903, a total period of 907 days, after allowing all just credits and set-offs.

Wherefore, your petitioner prays for judgment against the United States in the sum of four hundred and fifty-three dollars and fifty cents ($453.50).

CECIL D. ROSS,
By CHAS. F. CONSAUL,
Attorney.

(Power of attorney on file.)

4 II. *Traverse. Filed March 8, 1911.*

In the Court of Claims of the United States. December term, A. D. ——.

CECIL D. ROSS
vs.
THE UNITED STATES. } No. 24889.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.
B.

5 III. *History of proceedings.*

On March 8, 1911, the case was argued and submitted.

On March 27, 1911, the court filed findings of fact and conclusion of law, and entered judgment in favor of the claimant in the sum of $453.50.

On April 14, 1911, the defendant's filed a motion for a new trial.

IV. *Argument and submission of defendant's motion for new trial.*

On June 2, 1913, the defendant's motion for a new trial came on to be heard. Mr. George M. Anderson was heard in support of the motion, Mr. Charles F. Consaul was heard in opposition, and the motion was submitted.

6 V. *Order of court on defendant's motion for new trial. Filed December 1, 1913.*

The defendant's motion for a new trial allowed; former findings of fact and judgment vacated and set aside; new findings of fact, with conclusion of law entering judgment for claimant in the sum of $303.45, this day filed. Opinion by Booth, J.

7 VI. *Findings of fact (as amended Feb. 9, 1914, nunc pro tunc as of December 1, 1913), conclusion of law, and opinion of the court.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Finding of fact.

I.

The claimant herein, Cecil D. Ross, enlisted April 25, 1900, as an Infantry private in the United States Army; subsequently he was transferred to the Hospital Corps as a private, and was discharged from the service April 24, 1903, by reason of expiration of term of enlistment.

II.

The claimant was transferred to the Hospital Corps August 28, 1900, and was stationed at Jefferson Barracks, Mo., from September 8, 1900, to October 2, 1900. From there he was transferred to Fort McDowell, Cal., where he remained until November 8, 1900, when he was transferred to the general hospital, Presidio of San Francisco, Cal., where he remained until April 24, 1903, when he was discharged upon the expiration of his term of service. The claimant, upon his arrival at the hospital at the Presidio, November 9, 1900, was placed in charge of the telegraph and telephone office, by verbal order of the surgeon commanding at the hospital, and performed the duties thereof until September 26, 1902. From that date, at divers times intervening, to April 24, 1903, the claimant was sick in the hospital. At no time while performing the duties of telegraph operator was he under the supervision of anyone connected with the Signal Corps, but remained under the orders of the medical officer commanding at the said hospital.

III.

No payment has been made to claimant on account of the performance of said services as a telegrapher other than the usual pay and allowances of a private in the Hospital Corps of the United States Army.

IV.

The muster rolls of said hospital, from November, 1900, to April 30, 1903, show that, commencing November 9, 1900, and continuing uninterruptedly to December, 1901, claimant was each month reported as a "telegraph operator"; and thereafter, except on some occasions when he was reported as sick in hospital, he was reported as "telegraph operator" until the date of his discharge, April 24, 1903, when his term of enlistment expired. These muster rolls, returns from the Hospital Corps, passed under review of the detailing and commanding officers at the hospital, and in due course reached the War Department. An effort was made by the hospital authorities to secure the detail of a Signal Corps man in his place, but failed. During all the time claimant was at said hospital on duty, as stated, he was excused from other duties, calls, details, and inspection. The fact that claimant was in the telephone and telegraph department was known not only to the major and surgeon commanding, by virtue of the reports made as aforesaid, but it was personally known to him that claimant performed said duties from November 9, 1900, until the date of his discharge, except for 30 days, when he was sick, as aforesaid.

8 V.

U. S. A. GENERAL HOSPITAL,
Presidio, San Francisco, Cal., November 23, 1903.

Respectfully returned to Cecil D. Ross, late private, first class, Hospital Corps, U. S. A., Holly Springs, Miss., with the information that the following endorsement was written in this office on a communication from the Chief, Record and Pension Office, War Department, Washington, D. C., requesting information regarding your detail on extra duty in the telegraph office at this hospital:

"U. S. A. GENERAL HOSPITAL,
"PRESIDIO OF S. F., CAL.,
"*November 12, 1903.*

"Respectfully returned to the Chief, Record and Pension Office, War Department, Washington, D. C., with the information that Private Cecil D. Ross, Hospital Corps, U. S. Army, joined at this hospital for duty Nov. 8, 1900, and was discharged April 24, 1903, by reason of expiration of term of enlistment.

"He was on duty in the telephone and telegraph office at this hospital from Nov. 9, 1900, until date of discharge, but no printed order

was ever issued detailing him on extra duty, as at an institution of this kind there are many duties to be performed, the general character of which are similar.

"W. P. KENDALL,
"*Major and Surgeon, U. S. A., Commanding.*"

Although no order was issued detailing you on extra duty in the telephone and telegraph office at this hospital, you, nevertheless, performed this duty from November 9, 1900, until the date of your discharge.

W. P. KENDALL,
Major and Surgeon, U. S. Army, Commanding Hospital.

Filed as Exhibit A, Mch. 10, 1905. W. W. Wiles, Notary Public.

Conclusion of law.

Upon the foregoing findings of fact, the court decides, as a conclusion of law, that the claimant is entitled to recover judgment in the sum of three hundred and three dollars and forty-five cents ($303.45).

Opinion.

Booth, J., delivered the opinion of the court:

The claimant, Cecil D. Ross, enlisted as a private in the Infantry service and was transferred as a private to the Hospital Corps of the Army. He was assigned to the general hospital, at the Presidio, San Francisco, immediately upon his arrival, to the telephone and telegraph office of the hospital, and was on duty there from November 9, 1900, to the date of his discharge, April 24, 1903, when his term of enlistment expired, except as hereinafter stated.

The records of the War Department show that he was reported as "telegraph operator" each month, commencing with November, 1900, and continuing uninterruptedly during December, 1900, January, February, March, April, May, June, July, August, September, October, November, and December, 1901, and similarly was so reported during the several months of 1902, except when reported sick. He sues for "extra-duty pay," and before bringing his action he presented his claim to the Auditor for the War Department, who disallowed it, "for the reason that the records do not show that he was detailed on extra duty." Claimant appealed from the auditor's ruling, and the Comptroller held that "as it does not appear from the records in evidence in the case that the claimant was detailed by competent military authority for extra duty during any part of the period in question, he is not entitled, under the law and regulations, to extra-duty pay, as claimed."

9 He predicates his right to recover in this court upon section 1287, Revised Statutes, and the act of July 5, 1884 (23 Stat. L., 107, 110). This was "An act making appropriations for the support

of the Army for the fiscal year ending June thirtieth, eighteen hundred and eighty-five, and for other purposes"; and the part relied on by claimant is as follows:

"*Provided*, That two hundred and fifty thousand dollars of this sum, or so much of it as shall be necessary, shall be set aside for the payment of enlisted men on extra duty at constant labor of not less than ten days, and such extra-duty pay hereafter shall be at the rate of fifty cents per day for mechanics, artisans, school-teachers, and clerks at Army, division, and department headquarters, and thirty-five cents per day for other clerks, teamsters, laborers, and others."

In this connection, our attention is called to the Army appropriation act of March 3, 1885 (23 Stat. L., 359), having a similar title to that of the act of July 5, 1884, and containing a provision expressed as follows:

"*Provided*, That two hundred and fifty thousand dollars of the appropriation for incidental expenses, or so much of the same as shall be necessary, shall be set aside for the payment of enlisted men on extra duty, at constant labor of not less than ten days; and such extra-duty pay hereafter shall be at the rate of fifty cents per day for mechanics, artisans, school-teachers, and clerks at Army, division, and department headquarters, and thirty-five cents per day for other clerks, teamsters, laborers, and other enlisted men on extra duty."

The defendants contend that the foregoing provision for pay of enlisted men for extra duty applies only in the Quartermaster's Department, and further, that as Congress, during the period covered by the facts in this case, had made provision "for the detail as upon extra duty of enlisted men in the Quartermaster, Commissary, and Engineer Departments," and had not made provision for detail in the Medical Department, the claimant, who was in the Medical Corps, is not entitled to pay for extra duty, even if he rendered the same.

Under the view which we take of the act of March 3, 1885, that it is amendatory of section 1287 of the Revised Statutes, we can not yield to the Government's contention upon the point mentioned.

It will be noted in this connection that the proviso contained in the act of March 3, 1885, supra, and above quoted, is somewhat broader than the provision in the act of July 5, 1884, supra, also set out above, in that the later act refers to the appropriation for "incidental expenses," and instead of closing with "others," adopts the phrase "and other enlisted men on extra duty." And whilst it appears upon an examination of subsequent enactments (23 Stat. L., 485, 829; 26 ib., 153, 775; 27 ib., 179, 483; 28 ib., 239, 659; 29 ib., 65, 614; 30 ib., 323) that extra-duty pay is provided for in the Quartermaster's Department, or the work done therein, it does not necessarily follow that the act of March 3, 1885, has no further operation, if, as a matter of fact, it was amendatory of section 1287 of the Revised Statutes. In other words, the appropriation made for extra-duty pay in the Quartermaster's Department for work done therein does not defeat the purpose of the act of March 3, 1885, to designate certain classes of workmen and fix their extra-duty pay. The language of this act makes it

applicable to extra-duty pay thereafter and fixes the rate of pay for specified classes at "Army, division, and department headquarters."

Besides this, the subsequent statutes above cited (which, under the Government's contention, would confine the extra duty to the Quartermaster's Department) not only do not fix the rate of compensation "for the class of persons employed therein," but declare that no payments shall be made at any greater rate per day than "as fixed by law" for the class of persons employed. It further appears from the act of July 5, 1884 (23 Stat. L., 107), under the head of "Pay Department," that provision is made for enlisted men for service in hospitals, while under the head of "Quartermaster Department—Incidental expenses," appropriation is made for "extra pay to soldiers employed under the direction of the Quartermaster Department." So, also, appropriation was made in that act for extra pay under the head of "Transportation of the Army, Engineer Department, Ordnance Department," and "for construction and repair of hospitals, including pay of enlisted men employed on extra duty on same." In the act of March 3, 1885 (23 Stat., 357), similar provision is made for "extra pay to enlisted men for service in hospitals" and for extra pay under the head of "Quartermaster Department—Incidental expenses," and under the heads of "Engineer and Ordnance Departments." The act of June 30, 1886 (24 Stat., 96), and the act of February 9, 1887 (24 Stat., 397), provide for extra pay to soldiers under the head of "Quartermaster Department—Incidental expenses," and some other departments; and, generally speaking, the acts making appropriations for the Army from 1887 to 1899 contain similar provisions as those last above mentioned, and for various departments, but do not by name appropriate for extra-duty pay in the Medical Department, so far as our investigation of these statutes discloses. It is, however, apparent from all these statutes that the Congress has recognized that "extra duty" is to be paid for at a rate fixed by law, because we do not find in any of these statutes subsequent to the act of March 3, 1885, any fixing of the rate of compensation for extra duty. We must therefore look to some other enactment for the rate "fixed by law," and, in our opinion, the statute of March 3, 1885, is the statute which fixes it.

Section 1287 of the Revised Statutes is itself taken from section 7 of "An act making appropriations for the support of the Army, and for other purposes," approved July 13, 1866 (14 Stat. L., 90, 93), as amended by the act of February 1, 1873 (17 Stat. L., 422), whereby "the enlisted men of engineers in the Army" were placed on the same footing, with respect to compensation for extra-duty service, as "other enlisted men," and in declaring that "extra-duty pay hereafter shall be at the rate" mentioned, and in broadening the classes of persons entitled thereto it is evident that the Congress meant to amend section 1287 of the Revised Statutes. And this seems also to be the construction given by the Congress itself, as well as by the War Department, because in many of the Army appropriation acts the rate of compensation for extra duty is "as fixed by law," and the

comptroller, in disallowing the claimant's petition, does not make any question of the right of a properly detailed man to extra-duty pay.

We have stated the grounds upon which the department disallowed claimant's claim, and we recognize that we should have respect for contemporaneous constructions given to statutes the departments vested by law with their execution. In United States v.
11 Johnston (124 U. S., 236, 253) it is said to be a rule often announced by that court "that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight and should not be disregarded or overturned except for cogent reasons and unless it be clear that such construction is erroneous" (Brown v. United States, 113 U. S., 671, and cases there cited). It will be observed that neither the auditor nor the comptroller makes any question of the right of the claimant to extra-duty pay under the statutes, but they predicate their disallowance of his claim upon the grounds heretofore stated.

Was the claimant engaged in extra duty? Brady's case (15 Comp. Dec., 374) has a well-considered opinion dealing with extra and special duty and making a clear distinction between the two. The opinion rendered to The Adjutant General of the Army and concurred in by the Secretary of War, says: "The distinction between 'extra' and 'special' duty is as old as the Military Establishment."

* * * * * * *

"There is a kind of service, not always strictly military in character, which it has been found necessary to require of troops, and which, since 1819, has been designated as 'extra duty.' This duty has consisted in opening and repairing roads, constructing fortifications, barracks, storehouses, and other buildings at cantonments and military posts, the making of surveys, the construction and repair of bridges, etc. The works so described had no connection with the interior administration of companies as above described and was performed by the assignment of several companies, battalions, regiments, or brigades, the strength of the working party depending upon the importance, character, and necessity of the work to be done. As this constituted no part of a soldier's duty proper, provision for the payment of enlisted men engaged in such work was made at a relatively early day."

* * * * * * *

The opinion, after quoting from the act of March 2, 1819 (3 Stat. L., 488), adds:

"There is another form of extra duty upon which, for a number of years past, it has been found necessary and expedient to employ enlisted men. At every military post the constant services of certain classes of tradesmen, including carpenters, painters, plumbers, tinners, packers, teamsters, clerks in the supply departments, etc., are required. The services, if considerable in amount, are obtained by contract or from civil employees in the operation of their con-

tracts of employment. But, in a majority of cases, it has been found that they can be better rendered by enlisted men in the form of extra-duty service. The services rendered by these detailed soldiers are not rendered to their comrades and do not inure directly to their comfort and convenience; they are rendered to the public and might be obtained, as has been seen, by contract or from employees in the operation of contracts of employment. As these services are not a part of a soldier's duties, those who render them are entitled to compensation therefor, and such compensation has been fixed by Congress in the clause making provisions for extra-duty pay in the annual acts of appropriation for the support of the Army.

12 "From what has been said it will appear that since 1819 the terms special duty and extra duty have had a definite meaning in the administration of the Military Establishment. The term extra duty has related to constant labor, extending over a period of not less than 10 days, not connected with the interior administration of a company, regiment, or other organization, and for this service compensation in the form of extra-duty pay has been allowed by law."

Regarding these distinctions as sound, let us apply them to the facts of claimant's case. Having enlisted as a private in April, 1900, in the Infantry, he was transferred to the Hospital Corps as a private September 1, 1900, and on November 8, 1900, was sent to the general hospital, Presidio of San Francisco, and from the following day, November 9, 1900, and until the date of the expiration of his term of enlistment, except short periods when sick, he was in the telephone and telegraph office in operation at the hospital. During each month, commencing with November, 1900, and continuing uninterruptedly for more than a year, the muster rolls or hospital returns showed him to be on duty as "telegraph operator." We think that this service brought him well within the definition of "extra duty" laid down in the Brady case. His service was "not connected with the interior administration of a company, regiment, or other organization." The operation of telegraph instruments, as a duty more or less constant, is not, in our judgment, connected with the interior administration of the Hospital Corps; and to add to the duties of the enlisted man in the Hospital Corps the duties of a different employment and constant work, such as telegraph operator, necessarily removed the claimant during the time he was so engaged from the opportunities which he would otherwise have had of learning and becoming more proficient in the details of the particular service in which he was enlisted and which could have led to his promotion. Employed constantly as a telegraph operator, he was deprived of the opportunity for learning "the methods of rendering first aid to the sick and wounded," or to be detailed as acting hospital steward, or to avail himself of the other promotions provided for in the regulations (Army Regulations, 1901, par. 1608, 1591, 1595). Indeed, it appears that claimant, while acting as telegraph operator, "was excused from all the duties of a member of the Hospital Corps."

It is insisted, however, by the defendants that claimant was not detailed by competent authority, and we are referred to paragraph 185 of the Army Regulations, 1901, which reads as follows:

"185. Noncommissioned staff officers and enlisted men of the several staff departments will not be detailed on extra duty without authority from the Secretary of War. They are not entitled to extra-duty pay for services rendered in their respective departments."

We are inclined to question whether this paragraph has a definite application to the enlisted man or is a direction, rather, to the superior officer. It being his first duty to obey, it is not within the province of the enlisted man to inquire whether his detail has the sanction of the Secretary of War. Paragraph 182 of Army Regulations declares that enlisted men will not be placed on extra duty in the Quartermaster's and Subsistence Departments "without the sanction of the department commander," which implies, at least, that they may be placed on such duty with the sanction of the department commander; and paragraph 190 (Army Regulations, 1901)
13 provides that details for extra duty will be "limited to actual necessities, which will be determined by post commanders in accordance with 'orders from the War Department;'" and, again, there is a provision in paragraph 187 dealing with pay for extra duty, that payments made in violation of the rules will be "charged against the officers who ordered the details." The implication from the paragraph last cited is that the enlisted man is not to be held responsible, but the detailing officer may be; while in the several sections cited there is, it seems to us, a recognition that details may be made for extra duty of enlisted men by their superior officers; and if so, such action would be inconsistent with paragraph 167, Army Regulations, if the latter be held to apply as well to the enlisted men as to "the department commanders," post commanders, and other detailing officers. Besides this, section 1235 of the Revised Statutes declares that working parties shall be detailed in constant labor for 10 or more days only upon the written order of "a commanding officer," and we are not disposed to give a construction to paragraph 185, Army Regulations, which would bring it even remotely in conflict with this statute. (Romero's case, 24 C. Cls., 331; Sherlock's case, 43 Ib., 161.)

Upon the question of a necessity for a written order of detail in this case, we follow the Holthaus case (42 C. Cls., 544), where the claimant's name was continuously, for a long period, carried upon the muster rolls as being on extra duty, and the muster roll had to be and was approved monthly by the commanding officer and sent by him to headquarters. The claimant's employment on that duty was known to the commandant of the Marine Corps, both from the receipt and muster rolls at his office and also personally, and it was held that claimant could recover, regardless of section 1235, Revised Statutes. No appeal was taken in the Holthaus case, and it was subsequently followed by the department in the Narkle case (XIV Comp. Dec., 151).

The employment of the claimant here from November, 1900, to December, 1901, and, with some interruption, until April, 1903, in the telephone and telegraph departments, the Hospital Corps returns for each month for over a year designating him as a "telegraph operator," the fact that these monthly returns must have passed under review of the proper authorities of the Hospital Corps, including the detailing officer, and found their way in due course into the War Department, and the further fact that claimant's employment in the telephone and telegraph office was known personally to the major and surgeon commanding at said hospital, are sufficient, in our judgment, to entitle claimant to recover upon that phase of his claim. We do not mean to hold that a report of an enlisted man having been on extra or special duty can be accepted in all cases as a compliance with section 1235, Revised Statutes, or that when so employed for a short period a report of that service will relate back and take the place of a written detail; but we do hold that, under the facts of this case, the claimant should not be debarred from recovery because no order was issued in the first instance detailing him for extra duty.

We are, therefore, of the opinion that the claimant is entitled to recover. Section 1287, Revised Statutes, refers to artificers and laborers, and the act of March 3, 1885, refers to mechanics,
14 artisans, school-teachers, and "clerks" at headquarters in one class, and "other clerks, teamsters, laborers, and other enlisted men on extra duty." As above stated, we think the latter act was amendatory of section 1287 and enlarges in a way the classes referred to therein. We do not think the claimant was an artisan, because we think this term as used in the statute carries with it the idea of engagement in some construction work. (Words and Phrases, vol. 1, p. 517.) Nor do we think that claimant can be said to be a clerk at headquarters within the meaning of said statute, which distinguishes between two classes of clerks. If a clerk at all, which we question, he is by this statute regulating his pay put in the same class with other enlisted men, where the rate is fixed at 35 cents per day.

Our judgment will be for 857 days, at 35 cents per day, which is $303.45. It is so ordered.

15 VII. *Judgment of the court.*

CECIL D. ROSS,
vs.
THE UNITED STATES. } No. 24889.

At a Court of Claims held in the city of Washington on the first day of December, 1913, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree, that the claimant, Cecil D. Ross, do have and recover of and from the United States the sum of three hundred and three dollars and forty-five cents ($303.45).

BY THE COURT.

16 VIII. *History of further proceedings.*

On January 17, 1914, the defendants filed a request for amended findings of fact, which was presented to the court without argument.

On February 9, 1914, the court filed an order allowing the defendants' motion for amended findings of fact and filed amended findings nunc pro tunc as of December 1, 1913, as will appear in the record herein.

17 IX. *Application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 9th day of February, 1914, in favor of claimant, the defendants, by their Attorney General, on the 9th day of April, 1914, make application for, and give notice of, an appeal to the Supreme Court of the United States.

HUSTON THOMPSON,
Assistant Attorney General.

Filed April 9, 1914.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

APRIL 10, 1914.

18 Court of Claims.

CECIL D. ROSS,
vs.
THE UNITED STATES. } No. 24889.

I, John Randolph, assistant clerk Court of Claims, certify that the foregoing are true transcripts of pleadings in this cause and of the judgment entered for claimant for $453.50; of the argument and resubmission of case on the defendants' motion for new trial; of the order of court vacating former judgment and entering reformed judgment for claimant; of the findings of fact as amended February 9, 1914, nunc pro tunc as of December 1, 1913; of the conclusion of law and opinion of court by Judge Booth; of the judgment as reformed by the court for $303.45; of the application of Assistant Attorney General Huston Thompson for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court of Claims this 15th day of April, A. D. 1914.

[SEAL.] JOHN RANDOLPH,
Assistant Clerk Court of Claims.

(Indorsement on cover:) File No. 24171. Court of Claims. Term No. 449. The United States, appellant, vs. Cecil D. Ross. Filed April 16th, 1914. File No. 24171.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 131.

THE UNITED STATES, *Appellant*,

v.

CECIL D. ROSS, *Appellee*.

BRIEF FOR APPELLEE.

This case comes up on appeal by the United States from the judgment in favor of Cecil D. Ross, in the sum of $303.45, adjudged to be due him in payment for extra-duty rendered by him while a private in the regular army.

While the findings of fact made by the Court of Claims, and forming a part of the present record are not as full as they might have been made, they are sufficiently so to convey to this court a fairly clear idea of the case.

In order that this brief may be fairly complete in itself, however, we will set forth the most material facts found by the Court below, as follows:

Facts of Case.

Claimant, Cecil D. Ross, was a private in the regular army, in the Hospital Corps. Being a skilled telegrapher, he was ordered to take charge of the telegraph and telephone office at the general army hospital, at the Presidio, California.

He served in that office a total period of 857 days, during the years 1900, 1901, 1902 and 1903.

During that period he was relieved from all hospital duties, in order that he might give his time solely to the work to which he was ordered.

No written order is shown to have been made in the premises, but the muster rolls showed him in the performance of this duty during the entire period mentioned; those muster rolls, after passing through the hands of various officers, reached the War Department.

An effort was made by the officers of the Hospital Corps to secure the detail of a man from the Signal Corps to perform said duties, but without success.

Ross never received any compensation for the duties performed save the ordinary pay and allowances of a private of the Hospital Corps.

Claimant applied to the Auditor for the War Department for extra duty pay at the rate of 50 cents per day; his claim was rejected by that officer for the reason that the records did not show him to have been "detailed on extra duty." Ross appealed to the Comptroller who affirmed the action of the Auditor, because the records did not show that he "was detailed by any competent military authority for extra duty during any part of the period in question."

The suit in the Court of Claims was first tried with the result that judgment was entered for plaintiff in the sum of $453.50, being at the rate of 50 cents per day. On motion

for new trial by the United States, the judgment was reduced to $303.45, being pay at the rate of 35 cents per day.

While a private in the Hospital Corps, Ross never was permitted to perform any of the duties of a soldier in that corps. In brief, this soldier was kept on duty simply as a telegrapher during his entire term of service at the hospital mentioned.

With this summary of the facts found, we will call attention to the law applicable thereto.

Argument.

With all deference to the learned Assistant Attorney-General, we shall not follow his argument on the three headings set forth as being the contentions of the United States, on page 5 of his brief, as it seems to us that the case logically divides itself under two general heads, as follows:

First. Did appellee, Cecil D. Ross, while a private in the Hospital Corps, perform "extra duty," within the intent of the statute, in acting as a telegraph operator?

Second. If he did perform "extra duty," is he entitled to pay therefor, under the statutes, notwithstanding the failure of his superior officers to comply with the regulations of the War Department in matter of having him detailed for that duty, by written order of the Secretary of War?

We first call attention to the provisions of Sec. 1287, U. S. Rev. Stats., as follows:

> Sec. 1287. When soldiers are detailed for employment as artificers or laborers in the construction of permanent military works, public roads, or other constant labor of not less than ten days' duration, they shall re-

> ceive, in addition to their regular pay, the following compensation: Privates working as artificers, and non-commissioned officers employed as overseers of such work, not exceeding one overseer for twenty men, thirty-five cents per day, and privates employed as laborers, twenty cents per day. This allowance of extra pay shall not apply to the troops of the Ordnance Department.

The above was the law until enactment of the Army Appropriation Act of July 5, 1884 (23 Stats., 107-110), which contained the following provision (emphasis being ours):

> "*Provided*, That two hundred and fifty thousand dollars of this sum, or so much of it as shall be necessary, shall be set aside for the payment of enlisted men on extra duty at constant labor of not less than ten days, *and such extra duty pay hereafter* shall be at the rate of fifty cents per day for mechanics, artisans, school-teachers, and clerks at Army, division, and department headquarters, and thirty-five cents per day for other clerks, teamsters, laborers, *and others*."

Very much the same provision was contained in the Army Appropriation Act of March 3, 1885 (23 Stats., 359), reading as follows (emphasis being ours):

> "*Provided*, That two hundred and fifty thousand dollars of the appropriation for incidental expenses, or so much of the same as shall be necessary, shall be set aside for the payment of enlisted men on extra duty, at constant labor of not less than ten days; *and such extra-duty pay hereafter* shall be at the rate of fifty cents per day for mechanics, artisans, school-teachers and clerks at Army, division, and department headquarters, and thirty-five cents per day for other clerks, teamsters, laborers, *and other enlisted men on extra duty*."

It will be noted that the closing words of the later enactment are somewhat broader than those of the Act of 1884, in that provision is made for extra duty pay not only to mechanics, artisans, school-teachers, clerks, teamsters and laborers, but also for *"other enlisted men on extra duty."*

The phrase quoted shows that the pay was not to be confined to soldiers engaged in the various occupations enumerated, but that *any* soldier doing *any* extra duty should be paid therefor.

Did Ross Perform Extra Duty?

Ross was a private in the Hospital Corps, yet, so far as the record of this case tends to show, he never performed a single act or performed a single duty which to the lay mind would seem to pertain to the Hospital Corps. So far as indicated by the record he never entered a sick room; never administered medicine; never attended a case of illness or injury or rendered any service whatsoever calculated to fufill the ordinary, supposed functions of the Hospital Corps.

It is reported as a fact that the officers in charge of this general hospital attempted to secure the detail of a man from the *Signal Corps* to perform the duties which were performed by Ross, but failed in that effort; so Ross was compelled to act as telegraph operator for upwards of three years.

Were appellee at liberty to here refer to the evidence, consisting of the claimant's testimony and the War Department records it would be easier to place all the facts before the Court, but we will confine ourselves to the facts formally found by the Court of Claims, although we trust we may with propriety refer to one statement of fact contained in the opinion of the Court of Claims (Rec. P. 9), although

not set out in the formal findings of fact, and that is, that the continuous service of claimant as a telegraph operator made it impossible for him to secure promotion in the Hospital Corps, *because he had no opportunity to make himself proficient in the duties of a Hospital Corps private.*

On the general subject of *"extra duty,"* as distinguished from *"special duty,"* in the army, we refer to the opinion of the Court of Claims, which sets forth the official understanding of that distinction.

Concededly it would be difficult if not impossible to enumerate all the details of labor which might be reasonably and properly required of a hospital corps private. Soldiers, whether sick or well, must eat. Hence someone must cook. Floors and walls must be kept clean, so someone must sweep. The sick must have attention, so someone must nurse. All such duties, however, are of the general character that any reasonable man would expect to perform as a private in the Hospital Corps.

It would seem very plain, however, that what would be either ordinary or special duty in one branch or corps of the army would be extra duty if performed in another corps.

For instance, in the cavalry arm it is customary to break horses. A cavalryman engaged in that duty would be doing what would be expected of him; but not so if a Hospital Corps man were ordered to do that duty. So, also, if a cavalryman were ordered to do duty as nurse in a hospital; such duty would be extra duty for him, because it would not be the kind of duty pertaining to his branch of the service.

As showing that the duty of telegraph operator is one pertaining to the *Signal Corps*, and *not* to the *Hospital Corps*, we refer first to the act of Congress defining the duties of the Chief Signal Officer, being Sec. 2 of Act of Oct. 1, 1890 (26 Stats., 653), and reading as follows (emphasis being ours):

> Sec. 2. That the Chief Signal Officer shall have charge, under the direction of the Secretary of War, of all military signal duties, and of books, papers, and devices connected therewith, *including telegraph and telephone apparatus* and the necessary meteorological instruments for use on target ranges, and other military uses; the construction, repair, and *operation of military telegraph lines*, and the duty of collecting and transmitting information for the Army by telegraph or otherwise, and all other duties usually pertaining to military signalling; and the operations of said corps shall be confined to strictly military matters.

Now, if the Chief Signal Officer has the legal charge of "telegraph and telephone apparatus," and also of "the operation of military telegraph lines," how can it be maintained with any reason that any enlisted man save one in the Signal Corps can be required to perform the duties of a telegraph operator on a military telegraph line, without its being admitted that as to such man, that duty is *extra duty?*

As bearing on the intent of Congress as to the duties of the Signal Corps of the army, we refer also to the Army Appropriation Act of Feb. 24, 1891, (26 Stats., 779), and later acts, making appropriation for maintenance and repair of military telegraph lines, under supervision of the Chief Signal Officer.

Further, unless it was well recognized by the officers of the Hospital Corps that Ross was performing duties not in any way appertaining to his position as an enlisted man in the Hospital Corps, *why* did those medical officers try to secure the detail of a *Signal Corps* man to this very place, as found by the Court of Claims?

Surely the officers of the Medical Department would not ask the detail of a *Signal Corps* man to aid them in performing the duties of the *Hospital Corps.* That very fact shows plainly and beyond question that it was recognized in fact,

by claimant's superior officers, while he was performing this duty, that he was doing something which a Hospital Corps man should not be called upon to perform.

If that be a fact, then he *must* have been performing *extra* duty, not properly incident to his position.

Again, as shown from the opinion of the Court of Claims (pp. 5 and 8, record), it was not denied by the accounting officers that claimant actually did perform extra duty; their adverse decisions were based on the fact that he had not been *"detailed"* for that duty by written order of the Secretary of War.

Examination of the more recent Army Appropriation Acts discloses that Congress has by express enactment recognized the fact that even enlisted men acting as *telephone* operators are doing extra duty, and are entitled to the extra pay prescribed for extra duty.

We refer first to the Act of May 11, 1908 (35 Stats., 114), containing the following items of appropriation:

> "For extra pay to enlisted men employed on extra duty for periods of not less than ten days in the offices of district artillery engineers, district ordnance officers, and switchboard operators, at seacoast fortifications, eight thousand dollars."
>
> "For extra pay to enlisted men employed on extra duty as switchboard operators at each interior post of the Army, eight thousand dollars."

The same items were carried in the Act of March 3, 1909 (35 Stats., 739, also in 36 Stats., 249-250; 1043; 37 Stats., 576-709; 38 Stats., 358). We refer to these acts as showing a Congressional construction of the fact that switchboard operators were not performing the ordinary duties of a soldier, but were performing "extra duty," and if that be true of enlisted men handling only *telephone* apparatus for

transmission of messages, how much more forcible is the contention that one not a member of the Signal Corps, acting as a *telegraph* operator, is also doing extra duty?

The Auditor for the War Department, the Comptroller of the Treasury and the Court of Claims have all apparently agreed that the duty performed was *in fact extra duty*, but the accounting officers declined to allow the claim because claimant had not been formally detailed for that duty, by written order of the Secretary of War.

It is submitted that it can not be in reason denied that this enlisted man was engaged for between two and three years in doing something that he could not have contemplated doing as a member of the Hospital Corps; that the very officers under whom he performed that duty recognized the fact that it should be performed by a member of the Signal Corps, when they tried to secure a Signal Corps man for the place; and that he was not performing the duty pertaining to membership in the Hospital Corps, and hence must have been doing *extra duty*, within the purview of the statute.

Appellee Having Actually Performed Upwards of Three Years of Extra Duty, Is He Entitled to Pay Therefor?

While we have already quoted Sec. 1287, U. S. Rev. Stats., and the amendatory provisions of the acts of July 5, 1884 (23 Stats., 107-110), and of March 3, 1885 (23 Stats., 359), we wish to here again call to the notice of the Court that the concluding portion of the last mentioned amendatory act reads as follows (emphasis being ours):

> "and such extra-duty pay *hereafter* shall be at the rate of fifty cents per day for mechanics, artisans, schoolteachers, and clerks at Army, division, and department headquarters, and thirty-five cents per day for other

clerks, teamsters, laborers, *and other enlisted men on extra duty.*"

On its face, the concluding language of the act is broad enough to cover within its operation *all* enlisted men who perform *any* extra duty for a period of more than ten days.

The Government argues that no specific appropriation has been made for extra duty pay to men of the Hospital Corps, and that, therefore, claimant can not recover. In other words, it is contended by the Government that, even if a general statute has fixed the extra pay to be given for extra duty done, claimant can not recover unless he can point to a specific appropriation from which the extra duty pay should come.

That contention is not well founded, as we shall show.

The principle involved is the same as that followed by this Court in United States v. Langston, 118 U. S., 389. In that case express statute fixed the annual salary of the Minsiter to Hayti at $7,500.00 per year. For several years, however, only $5,000.00 was appropriated in payment of the salary of that officer. The appropriation acts during that period did not state that the sums appropriated should be received in full payment, and it was held that the mere inadequacy of the appropriation did not preclude the officer from recovering the balance of his salary as fixed by law. It may be noted, also, that in said case this Court distinguished the prior cases of United States v. Fisher, 109 U. S., 143, and United States v. Mitchell, 109 U. S., 146, in one of which cases the reduced appropriation was made in full compensation, and in the other of which there was a plain intent of Congress to alter the compensation of certain employees.

If it be assumed, as may be reasonably done, that the officers of the Medical Corps have been in the habit of de-

manding extra duty from enlisted men serving under them, without complying with the Army regulations in matter of securing their written detail by the Secretary of War, and if said officers, as is evidently the case, have not deemed it necessary to see to it that their enlisted men secure the money to which they are by law entitled, then it would go without saying that they would never submit any *estimate* of any money required for extra duty pay. No *estimates* being submitted, needless to say no *appropriation* would ever be made.

It seems to us that the Assistant Attorney-General is reasoning in a circle, in this case, for his line of argument assumes the very thing that claimant says has *not* been done, and that is, that the officers of the Medical Department have complied with the law.

That the intent of Congress was to amend the terms of Sec. 1287, U. S. Rev. Stats. by the Army Appropriation Acts of 1884 and 1885, is plain, for in later Army Appropriation Acts, appropriation after appropriation was made for extra duty pay at rates, or at sums not greater than the rates *"fixed by law."* Where is the law to be found to govern those payments if not in Sec. 1287, U. S. Rev. Stats., as amended by said Acts of 1884 and 1885? It is to be noted that the later appropriation acts did not repeat, year after year, the general provisions of said Acts of 1884 and 1885. Evidently, it was supposed by the officials of the War Department and of the Army that the rates had been fixed, and therefore, it was not deemed necessary to continually repeat those rates.

We refer, in proof of this statement, to the following Army Appropriation Acts: 24 Stats., 97-398; 25 Stats., 484, 828-829; 26 Stats., 151, 153, 774-775; 27 Stats., 178-179, 484, 485; 28 Stats., 237-239, 659-660; 29 Stats., 64-65, 612-614; 30 Stats., 321-323, 1069-1070; 31 Stats., 211-212,

904-905; 32 Stats., 513-514, 935-936; 33 Stats., *267-269*, 833-835; 34 Stats., *246-249*, *251*; 35 Stats., 116-118, 741-743; 36 Stats., *252-253*, 1046-1048.

Until the Act found in 30 Stats, 1070, the appropriation for the Subsistence Department extra duty pay always used the term, "at rates fixed by law," and that for the Quartermaster Department used the phrase, "but no such payment shall be made at any greater rate per day than is fixed by law for the class of persons employed and the work done."

Thereafter the commissary item retained the same phraseology, but the quartermaster item was made general, under incidental expenses, and did not refer to any rates at all, supposedly because it would go without saying that the established legal rates would be followed.

In further proof of the fact that the acts of 1884 and 1885 were operative to change the theretofore existing rates of extra duty pay, we call attention, also, to the fact that the pay of the *entire* army was *changed* by provisions in the Army Appropriation Act of May 11, 1908 (35 Stats., 108-109), and that the language used was substantially the same as that used in the amendatory acts of 1884 and 1885, dealing with extra duty pay.

The provisions increasing the pay to all officers reads as follows:

> "That hereafter the annual pay of officers of the Army of the several grades herein mentioned shall be as follows: * * *"

That increasing the pay of enlisted men reads as follows:

> "That hereafter the monthly pay of enlisted men of the Army during their first enlistment shall be as follows, namely: * * *."

No question has been raised as to that change of pay being a continuing one, yet the manner of making it was ex-

actly the same as that used in amending Sec. 1287, U. S. Rev. Stats. in matter of enlarging the scope of the extra duty pay and increasing the rates.

It is apparently contended by counsel for the Government that, because the amendatory provisos in the Acts of 1884 and 1885 happened to be inserted in the act under the heading pertaining to the Quartermaster Department, that they must therefore be deemed applicable only to extra duty performed within that Department.

If that be correct, then how can opposing counsel account for the presence in those provisos of the words "school-teachers, and clerks at Army, division, and department headquarters?" Will he contend that all the classes of enlisted men there enumerated are supposed to perform their duties merely within the Quartermaster Department? We have yet to find anything in the statutes going to mark the Quartermaster General as head school-teacher of the Army.

Further, is the use of the word *"hereafter"* in the amendatory provisions to be ignored? If not, then does not its use mean that the provisions there enacted were to continue in force until changed by law?

The word "hereafter" means, as used in these acts, the same as the word "henceforth," or as the phrase *"from and after the taking effect of this act."*

In cases of Maxwell v. Moore, 22 How., 185, and of Yturbide v. U. S., 22 How., 290, it was held by this Court that, when the language of a statute was plain, this Court was wholly without power or right to add any condition to the terms of the statute. That same rule has been often announced and followed by saying that, when the terms of a statute are plain, there is no room for the operation of any rule of construction; that all that remains for the courts to do is to enforce the law as found.

If that be a correct rule for the courts, then it would seem

to be equally correct to be applied to an executive branch of the Government.

In the case at bar it is the plain intent of Congress that enlisted men of the army, who perform extra duty shall receive certain prescribed additional pay therefor.

The War Department has provided a rule, apparently addressed to the officers of the army, that no soldier of any staff department shall be detailed on extra duty without authority from the Secretary of War. So far as that regulation is directory of the action of officers, it may be a perfectly valid rule, and one designed to have salutary effect.

However, in addition to thus directing officers of the army not to detail enlisted men of the staff departments to extra duty without the authority of the Secretary of War, it is further provided by the rule that enlisted men of the staff departments are not entitled to extra-duty pay for services rendered in their respective departments.

There are several views which may be taken of this rule.

One is, that presumably, in cases of unusual character, the Secretary will, on attention being called to them, issue the necessary order for the extra-duty detail. In that event, then, under the statute, the soldier performing that extra duty can not be denied the statutory compensation for same.

Another view is that, presumably, all branches of the army cover all duties to be performed by the troops. Hence, if duty of a certain kind is to be performed, it will be possible for the officers to find some enlisted man whose duty it is to do it. That would have been illustrated in the case at bar had a Signal Corps man been detailed to take claimant's place as telegraph operator, for handling a telegraph office or instrument is a part of the day's work with a Signal Corps man.

When, however, it is contended that after Congress has enacted that *any* enlisted man (without discrimination as to

whether he be of a staff department), who performs *any* extra duty (without any clause to the effect that it must be done outside his own department), he shall be paid a certain small sum per day, that act is made subject to further conditions prescribed by the War Department, to the effect that it shall not be applied in favor of enlisted men of staff departments, and shall not be applied where the extra duty is construed as done within the department, then this contention is a very palpable effort on part of counsel representing the United States to claim for the War Department distinctly legislative power—a power to add conditions to an act of Congress.

Some officers might take a liberal or fair view of the matter, and exercise great care to protect the rights of their men to secure extra pay for extra duty; while others, more economically inclined where the interests of enlisted men were involved, might merely order their men to do the extra duty, which they could not refuse to do, under penalties, and at the same time see to it that no authority was ever secured from the Secretary of War.

It was the obvious will of Congress to pay enlisted men something in addition to their regular army pay, for extra work *done*.

Congress did not say that enlisted men shall be paid extra for extra duty if their officers go through certain formalities with regard to the matter. It prescribed certain additional compensation for extra services, and presumably *meant that pay to accompany the performance of the duty by the enlisted men.*

It was certainly not intended by Congress that such pay might be given or withheld at the whim of the officers under whose orders enlisted men were compelled to labor. If Congress had so intended, Congress would have so enacted.

The Assistant Attorney-General is here seeking to have

this Court read into this statute a condition not placed there by Congress. Unless he can succeed in so doing, the appeal of the Government must be denied, and the judgment of the Court of Claims be affirmed.

Now as to the matter of failure of the army officers to *detail* Ross to perform this duty, by orders in writing, or to secure for that purpose the written order of the Secretary of War.

It was this phase of the case, and only this, that prevented allowance of the claim by the accounting officers.

Ross submits that he has a statutory right to this extra pay for extra duty done, and that no regulation of the War Department can operate to deprive him thereof; and, further, that no mere failure of any army officers to comply with any War Department regulation or rule can preclude claimant from securing that to which Congress has said he *should* receive if he performed certain duty.

As was suggested by the Court of Claims, it was the duty of Ross, as an enlisted man, to *obey* the orders of his superior officers. It was not his duty to argue with them as to whether they were complying with the statutes or the regulations of the War Department. He did obey, and after having fully complied with his orders, in a manner evidently satisfactory to his superior officers, he merely asks the compensation which the statute says shall be given to enlisted men who do extra duty.

To give effect to the army regulation No. 185, as precluding recovery by claimant would be tantamount to holding that officers of the army can, by infraction of the regulation, compel enlisted men to do the extra duty mentioned by Congress, without receiving the added compensation prescribed by Congress.

That would permit army officers to practically annul and render wholly ineffective an act of Congress.

Claimant did not take any action in derogation of army discipline when forced to do this extra duty; he complied with all requirements of army discipline, and counsel for claimant are unable to perceive how affirmance of the judgment in this case could be at all subversive of army government. It would seem to be infinitely more dangerous to decide that officers of the army can by failure to comply with army regulations, prevent an enlisted man from securing what is his in law.

It is not apprehended that affirmance of the judgment of the Court of Claims would bring about any cataclysm in Nature, or accomplish the destruction of the army or the nation.

The case is simply one where certain officers of the Government have assumed to ignore an Act of Congress. The claimant contends that the law has been complied with by him, in that he fully earned what he claims, by doing exactly what Congress prescribed as a condition to his receiving this extra pay.

That the War Department has ample authority to lay down rules for the discipline of the army is not questioned. The rule to that effect, laid down in Reaves v. Ainsworth, 219 U. S., 296, is not involved in any way in this case. This case is a mere matter of accounting, and it is for the Court to say whether, having performed extra duty, this former enlisted man shall receive the pay prescribed by Congress, or whether officers of the army can prevent his so doing.

That is the entire case, and it is now

Respectfully submitted,

I. M. MOYERS,

CHAS. F. CONSAUL,

Attorneys for Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, APPELLANT,
v.
CECIL D. ROSS. } No. 131.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is the claim of an enlisted man of the Hospital Corps, Medical Department, of the United States Army for extra-duty pay for services as telephone and telegraph operator at an Army hospital, and is a class case, appealed on recommendation of the Comptroller of the Treasury.

Appellee enlisted in the Army for general service on April 25, 1900. On August 28, 1900, he was transferred to the Hospital Corps, and after having served at several stations, was finally transferred to the General Hospital at the Presidio, San Francisco, Cal., on November 8, 1900. The following day he was assigned by verbal order

17609—15—1

of the surgeon in charge of the hospital to the duties of telephone and telegraph operator, and remained in the performance of such duties until September 26, 1902, when he was taken sick and at divers times confined to the hospital. At no time while in the performance of such duties was he under the supervision of anyone connected with the Signal Corps, but remained under the orders of the medical officer commanding at said hospital. (Findings I and II, Rec. p. 1.)

During the performance of such duties, appellee received only the usual pay and allowances of a private in the Hospital Corps. (Finding III, Rec. p. 2.)

The muster rolls of the hospital from November 9, 1900, to December, 1901, show that appellee was each month reported as "telegraph operator," and thereafter, except on some occasions when he was reported as "sick in hospital," he was reported as "telegraph operator" until the date of his discharge upon the expiration of his term of enlistment, April 24, 1903. These muster rolls passed under the review of the detailing and commanding officers of the hospital and in due course reached the War Department. An unsuccessful effort to secure the detail of a signal corps man in place of appellee was made by the hospital authorities. During appellee's whole tour of duty at the said hospital he was excused from other duties, calls, details, and inspections.

By virtue of the reports made as aforesaid, the fact that appellee performed duty as telephone and telegraph operator from November 9, 1900, to the date of his discharge, except for thirty days when he was sick, was personally known to the major and surgeon commanding. (Finding IV, Rec. p. 4.)

As stated by the major and surgeon commanding at the hospital, no order was issued detailing the appellee on extra duty because at an institution of that kind there were many duties to be performed the general character of which was similar. (Finding V, Rec. pp. 4, 5.)

The claim was filed by appellee with the accounting officers of the Treasury and was disallowed by the Auditor for the War Department, and on appeal to the Comptroller of the Treasury the disallowance was affirmed upon the ground that as it did not appear from the records and evidence in the case that appellee was *detailed* by competent military authority for extra duty during all or any part of the period in question, he was not entitled under the law and regulations to extra-duty pay. (Op. rec. p. 5.)

Appellant maintains:

1. That the proviso to the act of July 5, 1884, is not independent or general legislation, and that it is necessary, in order to entitle appellee to recover, that specific appropriations for extra-duty pay should have been made for enlisted men in the Medical Department during appellee's tour of duty at the General Hospital, Presidio, San Francisco;

2. That paragraph 185 of the Army Regulations for 1901, in force during the appellee's service at the General Hospital, not being in conflict with any law of the United States, prohibited his detail for extra duty and fixed his status as that of an enlisted man of the Hospital Corps performing the routine duties of the organization to which he belonged;

3. That the detail of appellee for extra duty should have been in writing signed by the commanding officer in order to have entitled him to extra-duty pay.

Appellee contends:

1. That the act of July 5, 1884 (23 Stat. 109, 110), is general legislation, and was enacted as an amendment to section 1287 of the Revised Statutes, and that no appropriation for enlisted men of the Hospital Corps was necessary during the period of the appellee's tour of duty at the General Hospital, Presidio, San Francisco, in order to entitle him to recover.

2. That the duties of telephone and telegraph operator at an Army hospital were not special duties for the benefit of a company, regiment, or other organization, but extra duty within the meaning of the proviso to the act of July 5, 1884, *supra*.

3. (*a*) That so much of paragraph 185 of the Army Regulations of 1901, in force during appellee's tour of duty at the hospital, as prohibited the detail of enlisted men of the staff departments to duty without the authority of the Secretary of War, was merely directory upon such officers and did not affect the claim for such service after performance.

(*b*) That so much of said regulation as declares that enlisted men in the staff departments are not entitled to extra duty pay is in conflict with section 1287 of the Revised Statutes as amended by the proviso to the act of July 5, 1884, *supra*.

4. That section 1235 of the Revised Statutes providing that details for extra duty shall be upon the written order of a commanding officer is merely directory upon such officer, but that if it should be held that such direction is mandatory and fixes the status of an enlisted man as not upon extra duty, the fact that the detail as telephone and telegraph operator was shown upon the pay rolls was sufficient to show a personal knowledge of such detail in the commanding officer.

ASSIGNMENT OF ERRORS.

The court erred:

1. In holding that the provisos to the acts of July 5, 1884 (23 Stat., 109,110), and March 3, 1885 (23 Stat., 359), are independent legislation.

2. In holding that certain special and temporary appropriations for extra-duty pay for enlisted men performing extra duty in departments other than the Medical Department were intended to have a general and permanent application to all future appropriations.

3. In holding that the fact that the appellee was borne on the pay rolls of the hospital corps for cer-

tain months during his service at the General Hospital, San Francisco, California, as telegraph operator, was a substantial compliance with paragraph 185 of the Army Regulations for 1901, prohibiting details of enlisted men of the staff departments for extra duty without the authority of the Secretary of War, and with section 1235 of the Revised Statutes requiring details for extra duty to be made in writing by a commanding officer.

4. In holding that the appellee performed extra duty during his term of service at the General Hospital at San Francisco, California.

5. In rendering judgment in favor of the appellee.

ARGUMENT.

There is no statute authorizing extra-duty pay to enlisted men of the Medical Department of the Army.

There is no assertion on the part of appellee that his claim for extra-duty pay comes within the purview of section 1287 of the Revised Statutes, which it is conceded applies exclusively to labor on public works, but he does claim that he is entitled to such compensation under that section as amended by a proviso to the act of July 5, 1884, making appropriation for enlisted men in the Quartermaster's Department of the Army.

Section 1287 of the Revised Statutes reads:

> SEC. 1287. When soldiers are detailed for employment as artificers or laborers in the construction of permanent military works, public roads, or other constant labor of not less than ten days' duration, they shall receive, in addition to their regular pay, the following compensation: Privates working as artificers, and noncommissioned officers employed as overseers of such work, not exceeding one overseer for twenty men, thirty-five cents per day, and privates employed as laborers, twenty cents per day. This allowance of extra pay shall not apply to the troops of the Ordnance Department.

Section 1287 of the Revised Statutes was enacted as section 7 of the act of July 13, 1866 (14 Stat. 93), and contained a provision that "such working parties shall only be authorized on the written order of a commanding officer," which was omitted and carried to section 1235 of the Revised Statutes.

Before codification, section 7 of the act of July 13, 1866, *supra*, was made applicable to enlisted men of the Engineer Corps by the act of February 1, 1893 (17 Stat. 422), which declared:

> That the enlisted men of Engineers in the Army are hereby placed on the same footing with respect to compensation for extra-duty service as the other enlisted men of the Army, and that all laws or parts of laws in conflict with this provision be, and the same are, hereby repealed.

So much of the act of July 4, 1884 (23 Stat. 109, 110), as is relevant to the questions raised is found under the heading "Quartermaster's Department," and reads as follows:

> For incidental expenses, to wit, * * * extra pay to soldiers employed under the direction of the Quartermaster's Department in the erection of barracks, quarters, and storehouses, and as clerks for post quartermasters at military posts; in the construction of roads, and other constant labor, for periods of not less than ten days, including those employed as clerks and messengers at division and departmental headquarters; * * * *Provided*, That two hundred and fifty thousand dollars of this sum, or so much of it as shall be necessary, shall be set aside for the payment of enlisted men on extra duty at constant labor of not less than ten days, and such extra-duty pay hereafter shall be at the rate of fifty cents per day for mechanics, artisans, schoolteachers, and clerks at Army, division, and department headquarters, and thirty-five cents per day for other clerks, teamsters, laborers, and others.

The enacting clause of the act of March 5, 1885 (23 Stat. 358, 359), relating to extra-duty pay is substantially the same as the enacting clause of the act of July 4, 1884, except that the provision for messengers has been omitted. The proviso differs slightly from the terms of the proviso of 1884, and as the lower court appears to attach some importance

to the changes there indicated (Rec. p. 6), the same will be quoted in full:

> *Provided*, That two hundred and fifty thousand dollars of the appropriation for incidental expenses, or so much of the same as shall be necessary, shall be set aside for the payment of enlisted men on extra duty, at constant labor of not less than ten days; and such extra-duty pay hereafter shall be at the rate of fifty cents per day for mechanics, artisans, school-teachers, and clerks at Army, division, and department headquarters, and thirty-five cents per day for other clerks, teamsters, laborers, and other enlisted men on extra duty.

In connection with these two statutes the attention of the court is called to the act of March 15, 1898 (30 Stat. 322, 323), which, if it be regarded as an amendment to the acts of July 5, 1884, *supra*, and March 3, 1885, *supra*, strictly limited those provisions to employees of the Quartermaster's Department.

This act, under the heading Quartermaster's Department, reads:

> Incidental expenses * * * extra pay to soldiers employed on extra duty under the direction of the Quartermaster's Department in the erection of barracks, quarters, and storehouses, in the construction of roads and other consistent labor for periods of not less than ten days, and as clerks for quartermasters at military posts, and for prison overseers at posts designated by the War Department for the confinement of general prisoners * * *

> *Provided,* That two hundred thousand dollars of the appropriation for incidental expenses, or so much thereof as shall be necessary, shall be set aside for the payment of enlisted men on extra duty at constant labor of not less than ten days in the Quartermaster's Department; but no such payment shall be made at any greater rate per day than is fixed by law for the class of persons employed at the work done therein.

This Court has said that the office of a proviso generally is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it as extending to cases not intended by the legislature to be brought within its purview. (*Wayman* v. *Southard,* 10 Wheat. 1, 30; *Minis* v. *The United States,* 15 Pt. 423, 445.)

In the case of *Pennington* v. *The United States* (231 U. S. 631–638), the question for decision was whether a proviso to an appropriation for "Back pay and bounty" declaring, "That in all cases hereafter so certified the said accounting officers shall, in stating balances, follow the decisions of the United States Supreme Court or of the Court of Claims of the United States after the time for appeal has expired, if no appeal be taken, without regard to former settlements or adjudications by their predecessors" was independent or general legislation and applicable to claims other than those for back pay and bounty.

The court expressed its disapproval of the practice of wrenching a proviso from the enacting clause (p. 637), and concluded with this vigorous language which is so appropriate that we quote it in full:

> And this leads us finally to examine the contention that as in modern practice it has become common to adopt independent legislation on appropriation bills by what is called a "rider," therefore the provision here involved should be treated as having that character and be accordingly independently interpreted as claimed. But whatever be the new habit, it can in no respect serve to relieve the judiciary when called upon to consider a statute, of the old duty of correctly interpreting it. Indeed, the very suggestion of the practice of "riders" admonished that things may not be so associated as one for the purpose of securing the enactment of legislation upon the theory that they are one and when enacted be disassociated for the purpose of judicial construction so as to cause them to be wholly independent one of the other.

The Court of Claims in its opinion argues that the proviso to the act of 1885 is not confined to employees of the Quartermaster's Department, but is general and independent legislation, and as proof of the soundness of its contention cites a number of instances where extra-duty pay has been provided for enlisted men of departments other than those of the Quartermaster's Department.

For instance, under the heading "Pay Department" the act of July 5, 1884 (23 Stat. 107), appropriated

for "extra-duty pay to enlisted men for service in hospitals," and under the same heading by the act of March 3, 1885 (23 Stat. 357), appropriation was also made for "extra-duty pay to enlisted men for service in hospitals." There were also a number of other appropriations pointed out for extra-duty pay for enlisted men in the Engineers, Ordnance, and Subsistence Departments, and the appropriation for each was set out under the appropriate heading, and always independent of the appropriation for the Quartermaster's Department. The court in its opinion, however, says that it was unable to find any specific appropriations for extra-duty pay to enlisted men of the Medical Department under that heading.

However, if extra-duty pay under any of the appropriations for departments other than the Quartermaster's Department was intended to be regulated as to the amount per diem by the rates fixed by the proviso to the acts of 1884 and 1885, it shows conclusively that Congress did not intend to enact independent or general legislation in such provisos, and that the appropriations were only intended to be effective for the years for which they were made, and did not operate to amend the permanent law.

During the entire period of service of appellee at the General Hospital at San Francisco, Cal., from November 9, 1900, to April 24, 1903, appropriations for extra-duty pay were made for enlisted men on extra duty in the Quartermaster's, Subsistence, and Engineer Departments of the Army, but no provision whatever was made for extra-duty pay to

enlisted men on extra duty in the Medical Department or any other departments or subdivisions of departments during that period. (30 Stat. 211, 213, 215, 216, 904, 905, 906; 31 Stat. 911, 904; 32 Stat. 513, 514, 515, 516, 518, 519.) These were all special and temporary appropriations without a suggestion or an intention to extend the gratuity beyond the years for which they were made.

In the case of the *United States* v. *Vulte* (233 U. S. 509–515) the question for decision was whether the exception of Porto Rico in terms from the appropriation acts for the years 1906 and 1907, for 10 per cent increase for service beyond the limits of the United States, was intended as an amendment to the general act of 1902, providing 10 per cent increase to officers of the United States Army on duty outside of the United States.

The court said that provisions making special and temporary appropriations will not be construed as expressing the intent of Congress to have a general and permanent application to all future appropriations, and that the operation of the law was suspended during the years for which no appropriations were made (pp. 514, 515).

Mr. Justice Harlan, who delivered the opinion in the case of *Hooe* v. *The United States* (218 U. S. 322, 334, 335), discussing section 1765 of the Revised Statutes, said:

> No officer in any branch of the public service, or any other person whose salary, pay, or

> emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

This court in construing the same section in *Hoyt* v. *The United States* (10 How. 109, 141) said:

> It cuts up by the roots those claims by public officers for extra compensation on the ground of extra services. There is no discretion left in any officer or tribunal to make the allowance unless it is authorized by some law of Congress. The prohibition is general, and applies to all public officers or quasi public officers who have a fixed compensation.

See also *United States* v. *King* (147 U. S. 676).

Mr. Justice Brewer, who delivered the opinion of the court in *Mullett's Admx.* v. *United States* (150 U. S. 570), discussing sections 1764 and 1765, said:

> Obviously the purpose of Congress, as disclosed by these sections, was that every officer or regular employee of the Government should be limited in his compensation to such salary or fees as were by law specifically attached to his office or employment. "Extras," which are such a fruitful subject of disputes in private contracts, were to be eliminated from the public service.

The right of enlisted men of the staff department to extra-duty pay was denied during the period of appellee's employment by regulations of the War Department.

Appellee was an enlisted man of the Hospital Corps, Medical Department, one of the staff departments of the Army, during his term of service at the General Hospital. His detail for extra duty was prohibited by paragraph 185 of the Army Regulations, as follows:

> Noncommissioned staff officers and enlisted men of the several staff departments will not be detailed on extra duty without authority from the Secretary of War. They are not entitled to extra-duty pay for services rendered in their respective departments.

The Secretary of War here declares that enlisted men of the staff departments "are not entitled to extra-duty pay for services rendered in their respective departments," and for that reason prohibited commanding officers from detailing them for such duty. When he said that such enlisted men were not entitled to extra-duty pay, he was carrying out existing laws.

It has been repeatedly held by this court that the regulations prescribed by the heads of executive departments, if not in conflict with some law of the United States, have the force and effect of statute law.

> *Gratiot* v. *United States*, 4 How. 80, 117; *Ex parte Reed*, 100 U. S. 13, 22; *United States* v. *Eaton*, 144 U. S. 677, 688.

Even if there had been an act of Congress authorizing appellee's detail on extra duty, the Secretary of War had authority to prescribe the manner in which the law should be executed. The mere fact that appellee's name was borne on certain pay rolls as "telegraph operator," which were eventually filed in some pigeonhole of the auditor's office in the Treasury, was not sufficient to create a presumption of knowledge of what had been done and ratification by the Secretary of War of an act which he had prohibited by an express regulation.

Appellee's detail for extra duty, if it had been authorized by law, should have been in writing, as required by section 1235 of the Revised Statutes.

Section 1235 of the Revised Statutes declares:

> Working parties of soldiers shall be detailed for employment as artificers or laborers in the construction of permanent military works or public roads, or in other constant labor, only upon the written order of a commanding officer when such detail is for ten or more days.

The words "or in other constant labor" in the act of March 2, 1819 (3 Stat. 488), authorizing extra pay for services of enlisted men of the Army in the construction of permanent military works, were construed by the Attorney General as covering clerical work by enlisted men in the executive departments. (2 Op. Atty. Gen. 706; 3 id. 116.)

The Court of Claims in its opinion also appears to have regarded the words "in other constant labor"

as applicable to the duties performed by the appellee as telephone and telegraph operator. It seeks, however, to avoid the effect of the statute by bringing home constructively to the commanding officer knowledge of the fact that appellee's name was carried on the pay rolls as such, and cites the case of *Holthaus* v. *United States* (42 C. Cls. 544), where the fact of appellee's employment as clerk in the office of the commanding officer at the marine barracks was personally known to the commandant of the Marine Corps, and the pay rolls were approved monthly by the commanding officer.

There is nothing in the record in this case to show that the Secretary of War ever knew of appellee's employment as telephone and telegraph operator at the hospital. In this connection we may say that extra-duty pay is purely a gratuity granted by Congress, which can only be acquired in the way prescribed.

The Court of Claims in the case of *Philips* v. *The United States* (47 C. Cls. 288, 297) held that a written order detailing an enlisted man for recruiting duty was not a written order detailing him as a clerk, although he performed such duties. The court there said:

> From what we have stated above we are of the opinion that the Congress intended only to grant extra-duty pay in exceptional cases, and clearly prescribed the procedure to be followed in placing soldiers within the restricted sphere of extra compensation for services rendered by them to the Nation.

By analogy this court's opinion construing a part of the act of April 26, 1898 (30 Stat., 364, 365), would appear to sustain the Government's contention that the assignment of appellee to work carrying extra pay should have been in writing. Section 7 of the act provides:

> That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised.

This section, providing for what may be termed a kind of extra duty, was construed in the case of the *United States* v. *Mitchell* (205 U. S. 161), and it was there held that an assignment in orders issued by competent authority would not operate to give an officer extra pay if he would have exercised the same command by virtue of being the senior officer present with the command at the time. The court, however, went further and held that such assignment must have been made in writing by the commanding officer. The position of the court is ascertained by an examination of the order of the regimental adjutant appointing the appellee to command the troop and the confirmation of the supposed assignment by the written order of the major general in command (pp. 162, 163). The court, in the statement of the case, called attention to the fact that

the Attorney General had held, under section 7 of the act of April 26, 1898:

> To entitle an officer to the pay of the grade above that actually held by him, the assignment in orders under the class cited must be by the written order of the commanding general in the field, or the Secretary of War, and no pay or allowance of a higher grade than that actually held by an officer will be paid under this provision, except when a certified copy, in duplicate of such order, with statement of service, is filed with the paymaster * * * (pp. 163, 164).

The court in concluding its opinion said:

> The *attempted* confirmation by Special Order No. 97 must fail of effect under section 7 for like reasons. (Italics ours.)

Appellee was not performing extra duty during his period of service at the General Hospital.

Assuming for the sake of argument that appropriations had been made during appellee's term of service, was he performing extra duty within the meaning of the term?

This court as early as 1841 drew a distinction between extra and special duty in the case of *Gratiot* v. *The United States* (15 Pt. 336, 375), where it held that the Chief Engineer of the United States Army in superintending the construction of several works of internal improvements was engaged in the performance of "the ordinary special duties appertaining to the office of Chief Engineer" and not entitled to extra compensation (p. 375).

The lower court in its opinion in this case has quoted extensively from the opinion of the Comptroller of the Treasury in the *Brady case* (15 Compt. Dec. 374), where a distinction was also drawn between extra and special duty, and where the Comptroller reached the conclusion that special duty was that which pertained to the interior administration of a company, regiment, or other organization. The court adopted this definition of special duty and thereupon declared that appellee was not within its terms.

The commanding officer at the hospital, speaking of the duties performed by the appellee, said that no order was issued detailing him for extra duty because "at an institution of this kind there are many duties to be performed, the general character of which are similar." (Rec. pp. 4 and 5.)

In this connection it may be said that the Hospital Corps is a military organization, and that hospital, as its name suggests, is the most important institution of the corps, and that there are numerous duties which, although not strictly military, are for the benefit of the organization, such, for instance, as the care of the grounds, attending to the furnaces, answering the front-door and room bells, sweeping the floors, and washing the windows. Can it be said, in these modern times of great industrial and mechanical progress, that telephone and telegraph instruments are unusual or unnecessary in these great military institutions; that hurry calls and telegrams in cases of critical ailment are not necessary, nay, even imperative? Instances can readily

be imagined where such conveniences are even more necessary than bells or speaking tubes in a hospital. The duties of a telegraph and telephone operator were certainly as necessary for the internal administration of a hospital as the duties of a clerk, held by the Court of Claims in *Brady* v. *The United States* (47 C. Cls. 286) to be special duty for which no compensation could be allowed.

It seems also very important for the efficiency of the Army that the War Department should determine, as far as possible, the duty status of officers and enlisted men; for, as this Court said in the case of *Reaves* v. *Ainsworth* (219 U. S. 296), going outside of the questions actually decided: "Courts are not the only instrumentalities of government; they can not command or regulate the Army, and the welfare and safety of the country, through the efficiency of officers of the Army, is greater than the value of his commission or the right of promotion of any officer of the Army."

CONCLUSION.

In conclusion, it is respectfully submitted that the judgment of the Court of Claims should be reversed and the case remanded with directions to dismiss the petition.

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